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Liam Heng Boon v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
J-05-272 OF 2009
ABDUL MALIK ISHAK, SYED AHMAD HELMY AND BALIA YUSOF
JJCA
10 DECEMBER 2012

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Criminal Procedure — Appeal — Appeal against sentence — Accused charged for trafficking in 42.71g of dangerous drugs — Accused sentenced to death — Defence of innocent carrier — Accused attempted to flee when confronted by police during ambush — Whether signified guilt — Whether defence probable — Whether accused had knowledge of drugs — Whether raised any reasonable doubt to prosecution's case — Whether presumption of trafficking rebutted on balance of probabilities

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The appellant was initially charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for the offence of trafficking ('the original charge'). Acting on an information received that a certain drug trafficking activity would take place, an ambush party was positioned. The appellant arrived at the scene riding a Yamaha motorcycle. SP2 then approached the appellant who then attempted to flee but to no avail. A body search revealed a pouch bag ('exh P12') fastened to the appellant's waist which contained a package wrapped with a Chinese newspaper and inside it was a plastic packet of a slab which was later analysed and confirmed to be 42.71g (3.46g of heroin and 39.25g of monoacetylmorphines). The appellant was charged in the High Court and at the close of the prosecution's case, the High Court judge amended the charge to one of possession under s 12(2) of the DDA. The appellant pleaded guilty to the amended charge and was sentenced to ten years imprisonment and ten strokes of rotan. Dissatisfied, the prosecution appealed against the said decision. The prosecution's appeal was allowed and the appellant was called to enter his defence on the original charge. The appellant's defence was that his motorcycle was used earlier in the day by his brother and it was this very motorcycle which he used to go to the scene of the crime to meet one Steven who intended to borrow money from him. According to the appellant, the drugs were placed in a small hole in the lower part of his motorcycle. The appellant submitted that he had no knowledge of the drugs in question. After hearing the defence, the High Court judge ruled that the defence had not raised any reasonable doubt as to the prosecution's case and had failed to rebut the presumption of trafficking on the balance of probabilities. The learned High Court judge then proceeded to convict the appellant on the original charge of trafficking and sentenced him to death. In the present appeal, the

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appellant submitted that there was no appreciation of the defence case by the High Court judge; and that it was a case of possession and not trafficking. A

Held, dismissing the appeal:

- (1) It was wrong to say that the High Court judge did not consider the defence of the appellant. Here was a case where the learned High Court judge was confronted with two versions. One version from the prosecution and the other version was from the appellant. The trial judge preferred the prosecution's version and he made a finding that the appellant's version was not probable having viewed the motorcycle himself and after considering the demonstration by the appellant of placing those exhibits in the compartment of the motorcycle (see paras 36–37). B C
- (2) The existence of Steven and that he wanted to borrow money from the appellant and that Steven wanted to see the appellant were not put across to the prosecution's witnesses. The existence of Steven was highly improbable bearing in mind that the appellant himself did not know Steven who was said to be interested in borrowing money from the appellant. The presence of the appellant at the scene was not because Steven wanted to meet him there, rather the appellant was at the scene to traffic the dangerous drugs as per the charge (see para 39). D E
- (3) Even if the learned High Court judge took into account that the appellant's brother was not a fictitious person, the outcome would still be the same. Regarding the issue of 'innocent carrier', since the drugs were found in the pouch bag fastened to the appellant's waist, the only reasonable inference to make would be that the appellant knew of the existence of the drugs and that the amount involved was indicative of trafficking (see paras 40–41). F
- (4) The facts in the present appeal could not turn the appellant from a trafficker to a mere passive carrier. There was evidence that the appellant attempted to flee before he was arrested. Here, the appellant knew that he was carrying the drugs because he wanted to flee when confronted by the police. The appellant was transporting the drugs and the inference that he was transporting them for the purpose of trafficking was irresistible. Since there was mens rea possession and the quantity of the drugs exceeded the amount as stipulated in s 37(da) of the DDA, the presumption of trafficking under s 37(da) of the DDA was triggered(see paras 43 & 51). G H
- (5) The evidence of the defence was incapable of belief and that it was not one that was probable under the circumstances. The defence had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his I

- A guilt which the prosecution had established beyond reasonable doubt. It was safe to convict the appellant (see para 60).

[Bahasa Malaysia summary]

- B Perayu pada mulanya telah dituduh di bawah s 39B(2)(a) Akta Dadah Berbahaya 1952 ('ADB') kesana keralahan pengedaran ('pertuduhan asal'). Bertindak atas maklumat yang diterima bahawa aktiviti pengedaran dadah tertentu akan berlaku, sepasukan serang hendap telah bersiap sedia. Perayu telah tiba di tempat kejadian menunggang motosikal Yamaha. SP2 kemudian
- C mendekati perayu yang kemudian cuba melarikan diri tetapi gagal. Carian badan mendapati sebuah beg kantung ('eksh P12') terikat pada pinggang perayu yang mengandungi bungkusan dibalut dengan surat khabar Cina dan di dalamnya terdapat bungkusan plastik satu papak yang kemudian dianalisis dan disahkan dadah seberat 42.71g (3.46g heroin dan 39.25g
- D monoacetylmorphines). Perayu telah dituduh di Mahkamah Tinggi dan di penutup kes pendakwaan, hakim Mahkamah Tinggi telah meminda pertuduhan kepada suatu milikan di bawah s 12(2) ADB. Perayu telah mengaku bersalah kepada pertuduhan yang dipinda dan telah dihukum penjara selama sepuluh tahun dan sepuluh sebatan rotan. Berasa tidak puas hati,
- E pendakwaan merayu terhadap keputusan tersebut. Rayuan pendakwaan telah dibenarkan dan perayu telah dipanggil untuk memasukkan pembelaannya atas pertuduhan asal. Pembelaan perayu adalah bahawa motosikalnya telah digunakan terlebih dahulu waktu siang itu oleh abangnya dan motosikalnyalah yang telah digunakannya untuk ke tempat kejadian jenayah
- F untuk bertemu dengan Steven yang bertujuan untuk meminjam wang daripadanya. Menurut perayu, dadah tersebut telah diletakkan ke dalam lubang kecil di bahagian bawah motosikalnya. Perayu berhujah bahawa dia tiada pengetahuan tentang dadah yang dipersoalkan. Selepas mendengar pembelaan itu, hakim Mahkamah Tinggi memutuskan bahawa pembelaan itu tidak menimbulkan apa-apa keraguan munasabah berhubung kes pendakwaan
- G dan telah gagal mematahkan andaian pengedaran atasimbangan kebarangkalian. Hakim Mahkamah Tinggi yang bijaksana kemudian terus mensabitkan perayu atas pertuduhan asal untuk pengedaran dan menjatuhkan hukuman mati ke atasnya. Dalam rayuan ini, perayu berhujah bahawa tidak terdapat apa-apa penilaian tentang kes pembelaan itu oleh hakim Mahkamah
- H Tinggi, dan bahawa itu adalah kes tentang milikan dan bukan pengedaran.

Diputuskan, menolak rayuan:

- I (1) Adalah salah untuk mengatakan bahawa hakim Mahkamah Tinggi tidak mengambil kira pembelaan perayu. Di sini adalah kes di mana hakim Mahkamah Tinggi telah berhadapan dengan dua versi. Satu versi daripada pendakwaan dan versi satu lagi daripada perayu. Hakim perbicaraan lebih menyebelahi versi pendakwaan dan membuat penemuan beliau bahawa versi perayu tidak berkemungkinan setelah

- melihat motosikal itu sendiri dan setelah mengambil kira demonstrasi oleh perayu meletakkan ekshibit-ekshibit tersebut dalam bahagian motosikal (lihat perenggan 36–37). **A**
- (2) Kewujudan Steven dan bahawa dia ingin meminjam wang daripada perayu dan bahawa Steven ingin melihat perayu idak dikemukakan kepada saksi-saksi pendakwaan. Kewujudan Steven amat tidak berkemungkinan kerana perayu sendiri tidak mengetahui siapa Steven yang dikatakan berminat untuk meminjam wang daripada perayu. Kewujudan perayu di tempat kejadian bukan kerana Steven ingin berjumpa dengannya di sana tetapi sebaliknya perayu berada di tempat kejadian untuk mengedar dadah berbahaya sebagaimana dalam pertuduhan (lihat perenggan 39). **B**
- (3) Jikapun hakim Mahkamah Tinggi mengambil kira bahawa abang perayu bukan seorang yang direka-reka, keputusannya masih sama. Berhubung isu ‘innocent carrier’, oleh kerana dadah itu dijumpai dalam beg kantung yang diikat pada pinggang perayu, satu-satu inferens munasabah untuk dibuat adalah bahawa perayu mengetahui tentang kewujudan dadah itu dan bahawa jumlah yang terlibat menunjukkan pengedaran (lihat perenggan 40–41). **C**
- (4) Fakta dalam rayuan ini idak akan menjadikan perayu daripada pengedar kepada pembawa yang pasif semata-mata. Terdapat keterangan bahawa perayu cuba melarikan diri sebelum dia ditangkap. Di sini, perayu mengetahui bahawa dia membawa dadah itu kerana dia ingin lari apabila berhadapan dengan polis. Perayu sedang membawa dadah dan inferens bahawa dia membawanya bagi tujuan pengedaran sukar ditolak. Oleh kerana terdapat mens rea milikan dan kuantiti dadah melebihi jumlah yang ditetapkan dalam s 37(da) ADB, andaian pengedaran di bawah s 37(da) ADB adalah terpakai (lihat perenggan 43 & 51). **D**
- (5) Keterangan pembelaan tidak boleh dipercayai dan ia bukan suatu yang kebarangkalian di bawah keadaan berikut. Pembelaan telah gagal mematahkan andaian pengedaran atas imbalan kebarangkalian dan oleh itu, ia tidak menimbulkan keraguan munasabah tentang kebersalahannya yang mana pendakwaan telah membuktikan melampaui keraguan munasabah. Adalah wajar untuk mensabitkan perayu (lihat perenggan 60). **E**
- F**
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Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 375–432. **I**

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Er Ah Kiat v PP [1965] 2 MLJ 238, FC (dstd)

- A** *Gooi Loo Seng v PP* [1993] 2 MLJ 137, SC (distsd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (distsd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
- B** *Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)
Pendakwa Raya lwn Haling Arala Jimjani [2008] 5 MLJ 331; [2008] 4 CLJ 163, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
- C** *PP v Chia Leong Foo* [2000] 6 MLJ 705, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146, HC (refd)
PP v Mohamed Ali [1962] MLJ 257 (refd)
- D** *PP v Tan Tatt Eek* [2005] 6 AMR 543, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54 (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

E Legislation referred to

Criminal Procedure Code s 180(1)
 Dangerous Drugs Act 1952 ss 2, 12(2), 37(da), 37A(da), 39A(2), 39B(1)(a), 39B(2), First Schedule

F Appeal from: Criminal Trial No 45–06 of 2003 (High Court, Johor Bahru)

Sukhaimi bin Mashud (Teh Poh Teik & Co) for the appellant.
Nurulhuda Nur'aini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

G Abdul Malik Ishak JCA (delivering judgment of the court):

[1] Liam Heng Boon — the appellant herein, was charged for trafficking in dangerous drugs, to wit, 42.71g comprising of 3.46g of heroin and 39.25g of monoacetylmorphines, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The charge that was laid against the appellant, in its original language, was worded as follows:

- I** Bahawa kamu pada 28 Mei 2002, jam lebih kurang 4.00 petang, di hadapan kedai Wan Hao Enterprise, No: 136-136A, Jalan Perwira 1, Taman Ungku Tun Aminah, Skudai, di dalam daerah Johor Bahru, dalam Negeri Johor Darul Ta'azim, telah didapati mengedar dadah berbahaya iaitu 42.71 gram (3.46 gram Heroin dan 39.25 gram Monoacetylmorphines) dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the close of the case for the prosecution, the learned High Court judge amended the charge to one of possession under s 12(2) of the DDA punishable under s 39A(2) of the DDA. The appellant pleaded guilty to the amended charge and the learned High Court judge sentenced the appellant to ten years imprisonment and ten strokes of the rattan. Dissatisfied with the decision of the learned High Court judge, the public prosecutor appealed to this court. Another panel of this court, on 15 January 2009, allowed the public prosecutor's appeal and ordered the appellant to enter his defence on the original charge of trafficking. However, no grounds of judgment was written by the other panel of this court when it delivered its decision on 15 January 2009.

[3] After hearing the defence, the learned High Court judge ruled that the defence had not raised any reasonable doubt as to the prosecution's case and the defence too had failed to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. The learned High Court judge then proceeded to convict the appellant on the original charge of trafficking and sentenced him to death. Aggrieved, the appellant now appeals to this court.

THE SALIENT FACTS

[4] On 28 May 2002 at 11am, ASP Teoh Paik Leng ('SP2') received an information from his source pertaining to a drug trafficking activity that would take place at the location as stated in the charge and the target was described as a male Chinese who would arrive at the location as stated in the charge riding a motorcycle.

[5] SP2 gathered twelve of his police personnel and briefed them about the impending operation that they would undertake. The police personnel were divided into three groups. The first group was headed by SP2 himself and he was assisted by five police personnel including Detective Lance Corporal 112740 Azmi bin Yusof ('SP4'). While the second group was headed by ASP Charun and he was assisted by three police personnel. Finally, the third group was headed by D/SI Zulkifly with the assistance of three police personnel.

[6] The first group was tasked with the duty of arresting the target, while the second and the third groups acted as 'back-up' personnel.

[7] By 12 noon of the same day, the police personnel took up their respective ambush positions. The first group was stationed at the curtain shop. SP2 located himself at a Chinese restaurant which was located next to the curtain shop. The second group was stationed at the junction of Jalan Perwira 3 and Jalan Perwira 8. While the third group was stationed at the junction of Jalan Perwira 1 with the main road. The police personnel then stood vigil and waited for the target.

A [8] At about 4pm of the same day, the target arrived at the scene riding a Yamaha brand motorcycle. At that point of time, SP2 was standing in front of the Chinese restaurant and he had an unobstructed view of the target. SP2 then approached the target who was seated astride the stationary Yamaha motorcycle with its engine still running. That prompted the target to flee but it was to no
B avail. The target fell from the Yamaha motorcycle when the said motorcycle knocked against the side of the drain. SP2 with the assistance of the other police personnel succeeded in arresting the target — now identified as the appellant. SP2 directed D/Sgt Isa to handcuff the appellant. At the time of his arrest, the
C appellant wore jeans, T-shirt and a crash helmet.

[9] SP2 physically examined the appellant and found a pouch bag (exh P12) fastened to the waist of the appellant. On examining the pouch bag (exh P12) in the presence of the appellant, SP2 found the following items:

- D (a) one Nokia telephone;
(b) one Nokia battery; and
(c) a bunch of keys.

E [10] SP2 seized the Yamaha motorcycle (exh 'P26') ridden by the appellant and that motorcycle bore registration No JDY 4771. SP2 also seized all the other exhibits and together with the appellant, brought them to his office and there, he handed the appellant and all the exhibits seized to the investigating
F officer by the name of Insp Ihsan bin Abdullah ('SP5').

[11] The key to the Yamaha motorcycle was also seized by SP2 and that key was marked as exh P16. A black coloured 'Polo Sport' wallet was also seized from the appellant by SP2. That wallet was marked as exh P18 and it contained
G cash RM905 which was marked as exh P20. That wallet (exh P18) also contained the identity card (exh P21) of the appellant. The driving licence (exh P22) and the insurance coverage (exh P23) of the Yamaha motorcycle were also seized by SP2. SP2 also prepared the search list as per exh P17 and it was also
H signed by the appellant.

[12] The evidence of SP2 was corroborated by SP4. Now, SP4 testified that on 28 May 2002 at 11am, he attended a briefing given by SP2 pertaining to a drug trafficking activity that would take place at the location as stated in the charge. According to SP4, SP2 described the target as a male Chinese and the
I police personnel were divided into three groups. SP4 testified that he was with the first group that was led by SP2 and that the first group was to assist SP2 in arresting the target.

[13] SP4 testified that SP2 directed the three groups to be located at strategic locations and after having taken up ambush positions, the three groups kept vigil and waited for the arrival of the target.

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[14] On 28 May 2002 at 4pm, SP4 and the police party saw SP2 approached a dark coloured motorcycle bearing registration No JDY 4771 (exh P26). As soon as SP4 and the police party came out from their ambush positions to assist SP2, all of a sudden, SP4 saw the rider of the said motorcycle had fallen into a drain. Swiftly, SP4 and the police party arrested a male Chinese that rode the said motorcycle.

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[15] After arresting the target (now referred to as the appellant), SP4 saw SP2 physically examined the appellant but nothing incriminating was found on him. SP4 then saw SP2 removed a pouch bag (exh P12) that was fastened to the waist of the appellant. According to SP4, SP2 then proceeded to examine the contents of the pouch bag (exh P12) in the presence of the appellant. Upon opening exh P12, a package wrapped with a Chinese newspaper was found and inside it was a plastic packet containing a slab suspected to be heroin. According to SP4, he heard SP2 directed D/Sgt Isa to handcuff the appellant.

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[16] SP4 testified that, at the material time, the appellant was wearing a red coloured crash helmet (exh P27) and the appellant's face was uncovered. According to SP4, after the appellant was arrested and the exhibits seized, the appellant together with the exhibits were taken to the narcotics division of the IPK Johor. SP4 further testified that the seized exhibits were constantly under the care of SP2.

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[17] According to SP4, SP2 did not kick the Yamaha motorcycle that was ridden by the appellant. SP4 testified that after the appellant fell from the Yamaha motorcycle, the appellant attempted to run before he was arrested by SP2 assisted by the police party. Of pertinence, SP4 testified that:

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'Pergelutan atau meronta-ronta berlaku antara ASP Teoh (SP2) dan OKT (appellant)' (see page 30 of the appeal record).

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[18] Under cross-examination, SP4 testified as follows:

- (a) that SP2 shouted loudly the words 'bantu, bantu' (assist, assist) before arresting the appellant who was at that time on the road;
- (b) that he disagreed that exhs P6, P7 and P8 were placed in the compartment of the Yamaha motorcycle;
- (c) that he disagreed that exhs P6, P7 and P8 were not found in the waist pouch fastened to the waist of the appellant;

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- A** (d) that he disagreed that SP2 kicked the Yamaha motorcycle which caused the said motorcycle to fall;
- (e) that the appellant fell together with the motorcycle;
- B** (f) that he disagreed that the appellant was arrested when the appellant fell down; and
- (g) that he disagreed that the appellant did not attempt to run away.

[19] There was no re-examination of SP4.

- C** [20] In due course, the yellowish substance was later analysed and confirmed by the government chemist, Encik Abdullah bin Mohd Yusof ('SP1'), to be dangerous drugs, to wit, 42.71g (3.46g of heroin and 39.25g of monoacetylmorphines) within the meaning of the First Schedule to the DDA.
- D**

THE APPELLANT'S DEFENCE

[21] In his sworn evidence, the appellant testified along the following lines:

- E** (a) that he worked as an unlicensed moneylender in Kulai;
- (b) that he had two elder brothers and one of whom goes by the name of Liam Heng Thong;
- F** (c) that Yamaha motorcycle belonged to him and that he was arrested while riding that motorcycle;
- (d) that it was Liam Heng Thong who used the Yamaha motorcycle at all times and that, in fact, on the day of his arrest Liam Heng Thong used the said motorcyle earlier in the day;
- G** (e) that on the day of his arrest, he received a telephone call from one Steven who wanted to borrow RM1,000 from him and that Steven wanted to see him at Taman Ungku Tun Aminah;
- H** (f) it was for this reason that he rode his Yamaha motorcycle and proceeded to Taman Ungku Tun Aminah to meet Steven whom he never knew before and that Steven had not informed him of the exact location of the meeting;
- (g) that he was arrested at Jalan Perwira 1, Taman Ungku Tun Aminah;
- I** (h) that he fell from his Yamaha motorcycle because one of SP2's men kicked his Yamaha motorcycle and that he did not run away;
- (i) that the plastic package containing the drugs was not found in his pouch bag (exh P12) which was fastened to his waist but was found in a small hole on the lower part of his Yamaha motorcycle; and

- (j) that the drugs did not belong to him and he did not know who had put the drugs in the small hole on the lower part of his Yamaha motorcycle and that earlier in the day, his brother Liam Heng Thong had used the said motorcycle.

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ANALYSIS

- [22] Only two grounds were raised before us, namely:
- (a) that there was no appreciation of the defence case by the learned High Court judge; and
 - (b) that this was a case of possession and not trafficking.

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THE FIRST GROUND

[23] To recapitulate, the defence of the appellant was that his Yamaha motorcycle was used earlier in the day by his brother Liam Heng Thong. And it was this very motorcycle which he used to go to the scene of the crime to meet one Steven who intended to borrow money from him. According to the appellant, the drugs were placed in a small hole in the lower part of his Yamaha motorcycle. That being the case, it was the stand of the appellant that he had no knowledge of the drugs in question.

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[24] It is wrong to say that the learned High Court judge did not consider the defence of the appellant. At pp 142–147 of the appeal record, the learned High Court judge assessed the defence of the appellant in this manner:

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Penilaian Terhadap Kes Pihak Pembelaan

- (9) Selepas menimbang kes pembelaan bersama-sama dengan kes pendakwaan, terdapat beberapa isu yang perlu diputuskan:
- (a) Sama ada dadah yang menjadi perkara pertuduhan dalam kes ini dijumpai di dalam beg pinggang yang dipakai oleh OKT atau dijumpai diselit di suatu lubang sebelah kiri di motosikal itu; dan
- (b) Sama ada OKT adalah 'innocent carrier' iaitu beliau tidak mengetahui kewujudan dadah berbahaya terselit di motosikal yang ditunggangnya.

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Isu (a)

- A** (10)
Berhubung dengan isu ini, mahkamah menerima versi saksi- saksi pendakwaan, terutama SP2, bahawa dadah tersebut sebenarnya dijumpai di dalam beg pinggang ('pouch beg') yang terdapat di pinggang OKT. Dadah tersebut terkandung dalam satu bungkus kertas berjenama 'Watson' (Eks. P6) yang membungkus kertas surat khabar Cina (Eks. P7). Dalam Eks. P7 pula terdapat 1 bungkus lutsinar berisi dengan dadah (heroin).
- B**
- (11)(12)
Berhubung dengan keterangan OKT yang mengatakan bahawa dadah tersebut diselit dalam satu lubang iaitu 'compartment' bahagian sebelah tepi motosikal, pada pandangan mahkamah, keterangan terdapat tersebut adalah tidak munasabah dan tidak dapat diterima. Analisis aspek keterangan ini pada peringkat kes pendakwaan masih terpakai walaupun dinilai bersama-sama dengan kes pihak pembelaan. Mahkamah berkata di perenggan (7), (8), (9) dan (10) Penghakiman seperti yang berikut:
- C**
- D** (7)
Selepas meneliti keterangan kes ini, dengan hormat, mahkamah bersetuju dengan hujah Timbalan Pendakwa Raya yang terpelajar bahawa pembuktian mengenai jagaan dan kawalan ekshibit dadah yang menjadi hal perkara pertuduhan adalah mantap dan kukuh. Adalah tidak boleh dipertikaikan bahawa Eks. P16 yang mengandungi ekshibit dadah itu dijumpai terikat atau dipakai pada pinggang OKT. Pihak pembelaan telah cuba mencadangkan bahawa Eks. P6, P7 dan P8 sebenarnya dijumpai pada 'compartment' bahagian sebelah tepi motosikal. Semua saksi utama pendakwaan telah dengan tegas menafikan cadangan tersebut.
- E**
- F** Mahkamah berpendapat, selepas melihat cara mereka memberi keterangan di mahkamah dan keseluruhan keterangan, tidak ada sebab bagi saksi-saksi tersebut tidak bercakap benar. Versi bagaimana Eks. P12 yang mengandungi Eks. P6, P7 dan P8 dijumpai sebagaimana yang diberi keterangan oleh SP2 telah disokong dalam semua aspek oleh keterangan D/Kpl Azmi (SP4).
- G**
- (8)
Pada 1 November 2007, mahkamah bersama-sama dengan Timbalan Pendakwa Raya dan Peguambela yang terpelajar serta OKT telah membuat pemeriksaan terhadap motosikal Yamaha JDY 5771 yang dibawa ke perkarangan mahkamah. OKT telah menunjukkan kepada mahkamah 'compartment' tersebut. Mahkamah berpendapat adalah sukar untuk OKT menyembunyikan Eks. P6, P7, dan P8 di situ. Apatah lagi sekiranya Eks. P12 dikatakan disembunyikan di dalam 'compartment' tersebut. SP2 juga mempunyai pandangan yang sama apabila beliau memberi keterangan:
- H**
- I**
- 'Saya tidak bersetuju Eks. P6, P7 dan P8 dijumpai dari motosikal. Tidak setuju Eks. P6, P7 dan P8 di bahagian kiri motosikal ... Saya tidak setuju sebab saya kata barang kes dijumpai dalam Eks. P12 untuk memperkuat kes.'

- (9)
Adalah tidak munasabah bagi OKT yang memakai beg pinggang (Eks. P12) meletakkan Eks. P6, P7 dan P8 pada 'compartment' bahagian kiri motosikal yang agak sukar untuk dibuat demikian dan belum tentu selamat. Pihak pembelaan tidak mengemukakan apa-apa cadangan yang munasabah bagi membolehkan mahkamah memberi pertimbangan untuk menolak keterangan SP2 dan SP4 dalam aspek ini. A
- (10)
Saya mendapati SP2 dan SP4 ialah saksi-saksi yang boleh dipercayai dan dengan demikian menerima versi apa yang berlaku pada hari kejadian sebagaimana yang diberi keterangan oleh mereka.' B
- Isu (b) C
- (13)
(13) Isu mengenai 'innocent carrier' ini telah diulas oleh banyak kes yang diputuskan oleh mahkamah-mahkamah atasan Malaysia. Bagi tujuan ini, barangkali memadai jika dirujuk kepada kes *Koh Keng Guan v Pendakwa Raya* [2009] MLJU 0590, apabila Mahkamah Rayuan, melalui penghakiman Low Hop Bing, HMR, telah menerangkan mengenai 'knowledge and innocent carrier'. (Sila lihat perenggan-perenggan (7) hingga (17) kes tersebut). D
- (14)
Mahkamah ini telah memberi perhatian yang serius terhadap aspek keterangan ini oleh OKT. Selepas menimbang semula isu ini, mahkamah memutuskan bahawa OKT mengetahui wujudnya dadah berbahaya yang menjadi hal perkara pertuduhan atas alasan-alasan yang berikut: E
- 14.1
Seperti yang dijelaskan sebelum ini, mahkamah telah memutuskan bahawa ia dijumpai di dalam beg pinggang yang terikat pada badan OKT dan bukannya dijumpai terselit di satu lubang pada motosikal itu; F
- 14.2
Keterangan OKT bahawa dia pergi ke Taman Ungku Tun Aminah untuk berjumpa dengan Steven adalah tidak boleh diterima berdasarkan keterangan yang wujud dalam kes ini. Steven dikatakan ingin meminjam wang daripada OKT tetapi, semasa disoalbalas, beliau tidak dapat memberi nombor telefon Steven, malah dia tidak kenal Steven. Steven dikatakan ingin meminjam RM1,000.00 tetapi wang yang dijumpai pada OKT semasa beliau ditangkap ialah RM905.00. Alasan yang diberikan mengenai jumlah wang ini ialah bahawa walaupun Steven ingin meminjam RM1,000.00 namun tidak semestinya jumlah penuh diberikan. Seterusnya, adalah luar dari kebiasaan bagi pemberi pinjam wang (OKT) untuk pergi berjumpa dengan peminjam wang (Steven) dan bukan sebaliknya, iaitu Steven datang berjumpa dengan OKT. G
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- A** 14.3 OKT menyatakan bahawa semasa dia dalam perjalanan menuju ke Taman Ungku Tun Aminah, Steven ada menelefonnya dan telefon itu berada di dalam beg pinggangnya. Oleh itu, tidak ada sebab bagi OKT tidak mengetahui mengenai kewujudan dadah di dalam beg
- B** pinggang tersebut semasa ia mengeluarkan telefonnya. (Lihat kes *PP v Abdul Rahman Akif* [2007] 4 CLJ 337).
- 14.4
- C** Pada pandangan mahkamah, Steven adalah orang rekaan OKT semata-mata dan bukannya orang sebenar ('real person'), la direka oleh OKT untuk melepaskannya dari pertuduhan yang dikemukakan terhadapnya.
- (15)
- D** Sebagai kesimpulan, mahkamah memutuskan bahawa pembelaan OKT telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pihak pendakwaan dan juga atas imbalan kebarangkalian, OKT telah gagal mematahkan anggapan di bawah seksyen 37(da) ADB 1952 (lihat kes *Mohammed Radhi bin Yacob v PP* [1991] 3 MLJ 169).
- E** [25] Notwithstanding the thorough assessment of the defence case by the learned High Court judge, learned counsel for the appellant argued that His Lordship had misdirected himself in that there was no appreciation of the appellant's defence when His Lordship failed to consider certain aspects of the defence case that spoke in favour of the appellant. It was argued that the
- F** following aspects of the defence case which gave credence to the appellant's version were not considered at all:
- (a) that Liam Heng Thong was not a fictitious person and that he was a real person;
- G** (b) the appellant's unchallenged testimony that he was not an unlicensed moneylender;
- (c) the appellant's unchallenged testimony that Liam Heng Thong had used the Yamaha motorcycle before the appellant used the same;
- H** (d) that the appellant's explanation on the amount to be lent to Steven was reasonable. According to the appellant, the full amount of the loan could not be given and that was why he only brought RM905; and
- (e) that it was reasonable for the appellant to meet Steven, a client, instead of the other way around, bearing in mind that the appellant was an
- I** unlicensed moneylender and furthermore, it was reasonable for both the lender and the borrower to meet outside the office.

[26] And flowing from all these, it was argued that the learned High Court judge should have ruled that Steven was a real person and that the appellant's

explanation that he did not know Steven's handphone number was reasonable. It was pointed out that nobody could remember another person's handphone's number unless he keeps it. It was submitted that the appellant here said that he cannot remember Steven's handphone number and not that he did not know the number.

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[27] It was submitted that the non-direction or the failure to appreciate the above aspects of the case in favour of the appellant has occasioned a serious misdirection which has the effect of rendering the conviction unsafe. Learned counsel for the appellant implored this court to allow the appeal and to acquit the appellant accordingly. We were urged to apply vigorously the following cases in favour of the appellant:

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- (a) *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC);
- (b) *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 (SC); and
- (c) *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238 (FC).

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[28] We will now examine these three cases in quick succession.

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[29] In *Lee Kwan Woh v Public Prosecutor*, the Federal Court was concerned with the situation where at the close of the prosecution's case, the learned trial judge ruled that he did not wish to hear submissions as he was satisfied that the prosecution had made out a prima facie case as required by s 180(1) of the Criminal Procedure Code. The Federal Court held that what the learned trial judge did was wrong. At p 316 (MLJ); p 646 (CLJ) of the report, Gopal Sri Ram FCJ had this to say:

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In our judgment, a trial court must, at the close of the prosecution case, invite submissions from an accused. It is then open to the accused to say that he or she does not wish to make a submission. But if he or she does not make that election, he or she must be heard. It is however open to the court, after it has heard those submissions to reject them and call for the defence without affording the prosecution a right to reply. This course does no harm to the prosecution. But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him or her of the opportunity to make a submission of no case.

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[30] Here, in sharp contrast, the appellant's counsel was accorded the right to submit at the close of the prosecution's case (see pp 40–41 of the appeal record).

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[31] Another complaint before the Federal Court in *Lee Kwan Woh v Public Prosecutor* was in regard to the failure of the learned trial judge to judicially appreciate the evidence at the close of the case for the prosecution. And at p 320 (MLJ); p 651 (CLJ) of the report, Gopal Sri Ram FCJ had this to say:

- A In our judgment, quite apart from the constitutional point, the appellant's conviction was plainly unsafe having regard to the facts and evidence as they stood at the close of the case for the prosecution. The learned trial judge clearly erred in the way he handled the facts and that in itself is sufficient ground for the appellate interference. See, *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 237; [1998] 2 CLJ 469.
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[32] Here, in sharp contrast, the learned High Court judge judicially appreciated and assessed the defence of the appellant as alluded to earlier.

- C [33] In *Gooi Loo Seng v Public Prosecutor*, the facts showed that after the appellant was detained by the police, he brought the police to the room occupied by him and his girlfriend where the police recovered from the bottom of a plastic cupboard two packages containing some substance which were later found to be heroin. A search list was prepared and signed by the officer in charge, Insp Nordin. Although Insp Nordin gave evidence that the packages were recovered from the cupboard by the appellant, the search list showed that it was Insp Nordin who recovered the packages. The appellant maintained that it was Insp Nordin who found the heroin and he denied all knowledge of the presence of the heroin in the room. There was also evidence that the appellant's girlfriend sometimes brought her friends to the room. At the conclusion of the trial, the learned trial judge convicted and sentenced the appellant to death and against that conviction the appellant had appealed. Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court had this to say at p 142 of the report:
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Had the trial judge approached the prosecution case in the manner we have indicated, we cannot confidently say that he would or must inevitably have rejected the appellant's version that he had no knowledge of the presence of the heroin in the bedroom and that it could have been hidden there by others having access to the bedroom in his absence.

- G We need hardly add, that even if the appellant had known of the presence of the heroin in his bedroom, that by itself would not have been sufficient to establish that he was in possession or in control of it given the fact that others too, and certainly his girlfriend Tan Ah Kwai, had access to the bedroom and could have concealed the heroin there. At the end of the day, this was a case of the proverbial cap which might have fitted not just the head of the appellant but that of others as well.
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- I Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy* 5 Cr App R 270: '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.

We must treat the failure of a trial judge sitting alone, to direct himself correctly in

the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

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Accordingly, we had no alternative but to allow the appeal, quash the conviction and to substitute in lieu thereof, an order of acquittal and discharge.

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[34] Here, in sharp contrast, the drugs were not recovered in a room. Rather, the drugs were recovered from the pouch bag (exh P12) fastened to the waist of the appellant. The appellant's defence was that the plastic package containing the drugs was found in a small hole on the lower part of the appellant's Yamaha motorcycle.

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[35] The appellant in *Er Ah Kiat v Public Prosecutor* was charged with having under his control a hand-grenade. He had made a statement to the police and at the trial, the admissibility of this statement was challenged. On this issue, the accused gave evidence on oath, in the course of which he explained how he came to know of the existence of the hand grenade and where it was hidden. That evidence, if believed, established that the hand grenade was not under his control but under the control of his friend. The statement was admitted and subsequently in his defence the appellant made an unsworn statement from the dock in the course of which he said '*as to the facts of the hand grenade I have already related to the court*'. The appellant was convicted and the trial judge in his judgment stated that he did not think he should consider the evidence given earlier by the appellant. Wylie CJ (Borneo) delivering the oral judgment of the Federal Court said at p 239 of the report:

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As it was the only defence put forward, the position is that the defence has not been considered at all. In accordance with established principles a conviction so arrived at cannot stand. Consequently, this appeal must be allowed, the conviction and sentence set aside and a new trial ordered.

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[36] Here, in sharp contrast, the appellant testified under oath and not from the dock like *Er Ah Kiat's* case and here too, the learned High Court judge considered the appellant's defence that the plastic package containing the drugs was found in a small hole on the lower part of the appellant's Yamaha motorcycle. The learned High Court judge also considered the demonstration by the appellant who showed how the exhs P6, P7, and P8 were placed in the compartment of the Yamaha motorcycle and His Lordship opined that it was rather difficult to do so ('Mahkamah berpendapat adalah sukar').

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[37] Here was a case where the learned High Court judge was confronted with two versions. One version from the prosecution and the other version was from the appellant. His Lordship preferred the prosecution's version and he made a finding that the appellant's version was not probable having viewed the Yamaha motorcycle himself and after considering the demonstration by the

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A appellant of placing those exhibits in the compartment of the Yamaha motorcycle. Confronted with two divergent versions as to the recovery of the offending drugs, we recalled to mind the sage words of Thomson CJ in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257:

B When a police witness says something that is not inherently improbable his evidence must be in the first instance be accepted. If his evidence is contradicted by other evidence or it shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

D [38] For the first time in his defence under oath, the appellant testified that he worked as an unlicensed money lender in Kulai. But this was not put across to SP2, SP4 and SP5. The legal position pertaining to such a failure has been well articulated by Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 where His Lordship said:

E The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

H [39] The existence of Steven and that Steven wanted to borrow RM1,000 from the appellant and that Steven wanted to see the appellant at Taman Ungku Tun Aminah were not put across to SP2, SP4 and SP5. The prosecution, on the other hand, cross-examined the appellant in regard to Steven and it was put that Steven was a mere figment of the appellant's imagination. The prosecution also challenged that Steven wanted to borrow RM 1,000 from the appellant. The issue pertaining to the belated disclosure of the defence can also be seen in the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 and the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705. Now, the existence of Steven was highly

improbable bearing in mind that the appellant himself did not know Steven who was said to be interested in borrowing money from the appellant. The presence of the appellant at the scene was not because Steven wanted to meet him there, rather the appellant was at the scene to traffic the dangerous drugs as per the charge.

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[40] It was argued that the Yamaha motorcycle was used earlier in the day by the appellant's brother by the name of Liam Heng Thong and the appellant did not know that the drugs were put in the compartment of the Yamaha motorcycle and without knowledge, the appellant was not in possession of the drugs. But the version advanced by the prosecution through SP2 and SP4 was accepted by the learned High Court judge which showed that the drugs were found in the pouch bag fastened to the waist of the appellant and actual possession had been proved by way of direct evidence. The appellant was transporting the drugs in his pouch bag using his own Yamaha motorcycle to the place mentioned in the charge and that constituted trafficking. And the trafficking provision under s 37(da) of the DDA would be invoked. Even if the learned High Court judge took into account that the appellant's brother by the name of Liam Heng Thong was not a fictitious person, the outcome would still be the same.

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[41] In regard to the issue of 'innocent carrier', we have this to say. Since the drugs were found in the pouch bag fastened to the waist of the appellant, the only reasonable inference to make would be that the appellant knew of the existence of the drugs. And that the amount involved was indicative of trafficking.

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THE SECOND GROUND

[42] It was argued that, at its highest, this was a case of passive possession and not trafficking and the charge ought to be amended to s 12(2) of the DDA and punishable under s 39A(2) of the DDA. But the defence of passive possession was never suggested to the prosecution. The appellant's defence was that the drugs were not found in the pouch bag (exh P12) fastened to his waist but was found in a small hole on the lower part of his Yamaha motorcycle. On the facts, we are satisfied that the appellant was not a passive carrier.

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[43] We acknowledge that passive possession is a recognised defence to trafficking. But, with respect, the facts in the present appeal cannot turn the appellant from a trafficker to a mere passive carrier. There was evidence that the appellant attempted to flee before he was arrested by SP2 and the police party. The Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129, considered the defence of the respondent there and concluded that the respondent there was not a passive

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A carrier. At p 206 (MLJ); p 149 (CLJ) of the report, Arifin Zakaria FCJ (now Chief Justice) writing for the Federal Court had this to say:

(21) In the present case, the drug was carried in small plastic packets each containing a small quantity of the drug. According to the evidence, 39.77 grammes of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09 grammes of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57 grammes of heroin was found in the left side pocket of the track top he was wearing. 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66 grammes of heroin. Judging from the manner the drug was being carried ie, in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial judge properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to s.60(1) of the CJA and upheld the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

F [44] Gopal Sri Ram JCA (later FCJ) writing for this court in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241, summarised the law lucidly in this way (see p 249 of the report):

To summarise, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

H [45] Abdull Hamid Embong HMR (now FCJ) writing for this court in *Pendakwa Raya lwn Haling Arala Jimjani* [2008] 5 MLJ 331; [2008] 4 CLJ 163, at p 342(MLJ); p 174 (CLJ), spoke of trafficking in the context of the supplier and the receiver and mere carrying constituted passive possession. This is what His Lordship said:

I (39) Adalah jelas daripada nasihat Privy Council dalam kes itu bahawa unsur-unsur pengedaran seperti terdapat dalam s. 2 ADB juga tidak boleh dibaca tanpa mengambilkira konsep dan rasional di sebalik unsur-unsur yang terdapat dalam seksyen itu. Ia harus dipertimbangkan dengan konsep adanya pembekal dan adanya penerima, yakni kewujudan dua pihak untuk mencapai maksud sebenar unsur-unsur tersebut. Tanpa ciri ini perbuatan membawa itu sahaja hanya boleh ditakrifkan sebagai satu milikan pasif oleh pembawanya.

[46] In *Y Jeyamurthy a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605, Mohd Ghazali Yusoff JCA (later FCJ) writing the majority judgment had this to say at p 245 (MLJ); pp 635–636 (CLJ) of the report:

(54) The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had knowledge. But to constitute trafficking under s.39B(1) of the Act, there must be mens rea possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act as has been decided in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (see also *Pendakwa Raya v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713).

[47] The late Augustine Paul J (later FCJ) in *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146, at p 155, laid down the law in these trenchant terms:

In order to prove the offence against the accused the prosecution must establish that the conduct of the accused falls within one of the acts as defined in s 2 of the Act most of which, as I said earlier, involve the constituent element of possession. The offence may be proved by direct evidence or with the aid of presumptions. Where the possession is passive in the sense that it does not involve any of the acts specified in the definition of ‘trafficking’ in s 2 of the Act so as to amount to ‘trafficking’ as defined the prosecution may rely on the presumption contained in s 37(da) of the Act to elevate such possession to ‘trafficking’ subject to proof of the requirement of the weight of the drugs concerned as specified therein. It must be remembered that it is not permissible to pile the presumption of trafficking under s 37(da) of the Act upon the presumption of possession under s 37(d) of the Act (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).

[48] Nik Hashim bin Nik Ab Rahman FCJ in *Public Prosecutor v Tan Tatt Eek* [2005] 6 AMR 543, at pp 551–552 had this to say about possession:

In the present case, the learned trial judge found that the bag was held in the respondent’s hand and that the respondent had physical custody and control of the bag. There was no express affirmative finding of possession as understood in criminal law by the learned trial judge. In the absence of such finding, the learned trial judge ought not to have called the respondent to make his defence on the charge of trafficking. In our view, the grounds on which the learned trial judge relied to find the respondent guilty of trafficking were completely untenable and unsustainable and could not withstand scrutiny. At most, the prosecution had only proved custody and control of the bag and the packages of the impure drugs, and under s 37(d), the presumption could have been invoked for possession and knowledge of the nature of the dangerous drugs in the bag and consequently, the respondent to be called to enter his defence on a charge of possession under s 12(2)

- A of the Act. On the authority of *Muhammed b Hassan*, the prosecution, however, cannot rely on the presumption of possession and knowledge under s 37(d) to presume that the respondent was trafficking in the dangerous drugs under s 37(da)(iiia) of the Act.
- B [49] Possession is an important ingredient. If there is direct evidence of trafficking, the case for the prosecution is made easier. But where there is no direct evidence of trafficking, the prosecution will have to prove the ingredient of 'possession'. And the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking can be invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC)).
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- D [50] Knowledge is an essential pre-requisite of possession. Knowledge is a mental element. According to *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54, possession in order to incriminate a person must have the following characteristics:
- E (a) the possessor must know the nature of the thing possessed;
- (b) the possessor must have the power of disposal over it; and
- (c) the possessor must be conscious of his possession of the offending item.
- [51] Here, the appellant knew that he was carrying the drugs in the pouch bag that was fastened to his waist while riding his Yamaha motorcycle because he wanted to flee when confronted by SP2. It can be said, from the facts, that the appellant was transporting the drugs and the inference that he was transporting them for the purpose of trafficking is irresistible. Since there was mens rea possession and the quantity of the drugs exceeded the amount as stipulated in s 37A(da) of the DDA, the presumption of trafficking under s 37A(da) of the DDA was triggered. Indeed, without the benefit of the grounds of judgment of another panel of this court that called for the defence of the appellant on the original charge of trafficking, the learned High Court judge surmised as follows (see p 139 of the appeal record):
- F Oleh itu, adalah dianggap (kerana tiada alasan penghakiman dikemukakan oleh Mahkamah Rayuan setakat ini) bahawa Mahkamah Rayuan berpuashati bahawa pihak pendakwaan telah berjaya membuktikan bahawa OKT mempunyai milikan mens rea tanpa perlu bergantung kepada anggapan di bawah seksyen 37(d) ADB 1952. Oleh kerana amaun dadah yang terlibat adalah melebihi amaun yang ditetapkan dalam seksyen 37(da) Akta, maka OKT adalah dianggap, sehingga
- G dibuktikan, sebaliknya, mengedar dadah tersebut.
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- I [52] So the appellant had to rebut the operative presumption of trafficking under s 37A(da) of the DDA on the balance of probabilities. That level of rebuttal places a higher evidentiary burden on the appellant (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC)).

[53] In order for the appellant to rebut this presumption of trafficking that had been invoked against him, he had to establish two things. Firstly, the appellant could lead by way of an affirmative evidence before the trial court that the subject matter of the charge was not dangerous drugs, to wit, heroin and monoacetylmorphines as defined under s 2 of the DDA, and even if it was heroin, its weight had not exceeded 15g and even if it was monoacetylmorphines, its weight had not exceeded 15g. Secondly, even if the appellant fails to do that, he would have to lead affirmative evidence on the balance that his conduct was not consistent with trafficking. And if the appellant fails to do that, a verdict of conviction against him must necessarily follow.

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[54] Here, the learned High Court judge heard the defence and considered the defence in extenso as reproduced somewhere in this judgment and His Lordship ruled that the defence had not raised any reasonable doubt as to the prosecution's case and the defence too had failed to rebut the presumption of trafficking under s 37A(da) of the DDA on the balance of probabilities.

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[55] By way of a reiteration, the learned High Court judge believed the evidence of SP2 and SP4 and accepted their versions of what had happened on the date of the offence. In short, His Lordship accepted SP2 and SP4 as credible witnesses. We agreed with His Lordship wholeheartedly.

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[56] It is clear that the evidence of the appellant was in complete variance from that of the prosecution. It is to be expected that in a trial, both the prosecution and the defence are expected not to agree on the version of the crucial events upon which the destiny of the entire case would ultimately hinge. However, the cross-examination of the appellant had the effect of chipping away at the credibility of the version of the appellant.

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[57] Here, we are concerned with a finding of fact made by the learned High Court judge who had the audio-visual advantage not available to this court. It is trite that an appellate court would not interfere unless the balance of the evidence is grossly against the conviction. In *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (FC), Abdul Hamid Omar FJ had this to say at p 93:

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The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness. In the instant case the learned trial judge very carefully analysed all the available evidence before him and made specific findings of fact founded upon that which he believed to be the truth. He also drew certain inferences from facts specifically found. In this respect we may form our independent view but we should

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only do so where the fact upon which the inference was drawn was either unwarranted or manifestly against the weight of evidence. That was not the case here.

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[58] We are acutely aware that the appellant was alone when he was arrested and that he attempted to flee. It was argued by learned defence counsel that taking flight could not be taken to infer guilt.

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[59] We took note that the amount of the drugs involved was only about two and a half (21/2) times above the statutory limit of 15g. And we also considered the speech of Lord Diplock in *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 (PC), especially at p 69 where His Lordship said:

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As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

E

[60] Taking the evidence of the defence and considering it in the context of the whole case, we found it to be, just like the learned High Court udge, incapable of belief and that it was not one that was probable under the circumstances. We found that the defence had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt. It is safe to convict the appellant.

F

[61] Here, the appellant was not in passive possession but he was committing an overt act in transporting the dangerous drugs in question. The appellant was therefore trafficking the dangerous drugs as stipulated in the charge. There are no merits in this appeal. We dismissed the appeal and we affirmed the conviction and sentence passed by the High Court.

G

Appeal dismissed.

Reported by Kanesh Sundrum

H

I